No. 20,879

In the United States Court of Appeals for the Ninth Circuit

R. J. LISON COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of R. J. Lison Company, Inc. to review an order (R. 34-37)[1] of the National Labor Relations Board issued on

[1]References to the pleadings reproduced as Volume I, Pleadings are designated "R." References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

March 29, 1966. In its answer the Board has requested enforcement of its order, which is reported at 157 NLRB No. 101. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[2] the unfair labor practices having occurred in Burbank, California, where petitioner is engaged in the sale and servicing of commercial power sweeping machines. No jurisdictional issue is presented.

I. Counterstatement of the Case

Briefly, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employees Curtis Reed and Stewart Taber because of their union activities.[3] The evidence upon which these findings rest is summarized below.

A. *The advent of the Union*

Two of respondent's six employees, Stewart Taber and Curtis Reed, contacted a union official in early August 1964[4] (R. 14; Tr. 67). Authorization cards were sent to the two employees, who distributed them to the other workers (R. 15; Tr. 67). As a result of Taber's and Reed's effort, all six employees authorized the Union to represent them and, on August 13,

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[2] Pertinent statutory provisions are reprinted, *infra*, pp. 15-17.

[3] Teamsters Automotive Workers, Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter referred to as the "Union") (R. 10).

[4] All dates hereafter are 1964 unless otherwise specified.

the Union filed a petition for an election (R. 11). An agreement for a consent election was approved by the Board's Regional Director on October 26 and an election was held on October 30, which the Union won by a unanimous vote. (R. 11). Accordingly, on November 13, the Union was certified as the exclusive bargaining representative of petitioner's employees *(ibid.)*.

On December 21, Richard Lee, a union official, conferred with Company President Robert Lison, his wife, and General Manager Peter McGrath (R. 11; Tr. 116, 208). Lee presented a proposed contract and the parties engaged in general discussion of its provisions (R. 11; Tr. 13). While discussing one of the contract terms, possibly the Union's proposal on hourly wages for mechanics, Lison remarked that he didn't consider most of his employees to be "full-fledged mechanics" since the previous job experience of one was restricted to working in a pet shop, another was only kept—or hired—because of Lison's desire to help him with his personal financial problems, and that ". . . Curt Reed was probably their only qualified mechanic" (R. 12; Tr. 13, 15). Later, during the same discussion, Lison turned to McGrath and said: "If Curt Reed and Stewart Taber hadn't been around, why, there wouldn't be any union, [we] wouldn't be sitting [here] today" (R. 11; Tr. 13). No agreement was reached on the contract.

B. *The discharges of Reed and Taber*

On the afternoon of Thursday, December 31, Dick Sheldrick, the plant service manager, handed Curtis

Reed his paycheck and told him it was his "last check from this company" (R. 12; Tr. 30). Reed, who had received neither notice nor other warning, was surprised and angered (R. 12; Tr. 30). When Reed asked why he was being discharged, Sheldrick answered that he had been "late too many times" (R. 12; Tr. 31).

Shortly thereafter, Reed met General Manager McGrath in the plant parking lot and asked why he had been fired (R. 13; Tr. 31). McGrath replied that it was because of Reed's inability "to do the work" (R. 13; Tr. 32). Reed asked if he might have a written statement to that effect. McGrath agreed and went to the plant office to type the statement (R. 13; Tr. 32). Meanwhile Reed, with Taber's assistance, gathered his tools and returned to the parking lot. McGrath came back to the lot and explained that he had talked to Lison, who refused to provide a statement setting forth the reason for Reed's discharge (R. 13; Tr. 32).

Later, on January 4, 1965, Union Organizer Lee telephoned McGrath and asked why Reed had been discharged. McGrath told him that Reed was discharged "because [he] was shaving on company time" (R. 13; Tr. 14).[5]

On January 22, 1965, Union Organizer Lee entered Company premises and engaged in conversation with

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[5] Still later, at the unfair labor practice hearing, McGrath testified that he and Plant Service Manager Sheldrick had conferred in late November to decide which of the employees should be laid off in view of the seasonal decline in work. According to McGrath, Sheldrick advised that Reed be discharged "because we had complaints about his work" (R. 13; Tr. 140).

Stewart Taber, who, as mentioned above, had been one of the chief union proponents during the earlier campaign (R. 16; Tr. 17). Sheldrick, standing 8 to 10 feet away, observed this contact. Leaving Taber, Lee went to McGrath's office where he again encountered Sheldrick (R. 16; Tr. 18-19). Lee asked to speak to McGrath and was received by him in an inner office (R. 16; Tr. 19). Lee informed McGrath, among other things, that "[t]he boys [are] thinking seriously of a strike situation if we [don't] get together and negotiate a contract" (R. 16; Tr. 19).

Less than an hour later, McGrath went to the parts department and asked Taber if he had been keeping accurate inventory control records (R. 16; Tr. 68).[6]

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[6] Taber, who was hired in January 1963, was senior to all other employees (R. 14; Tr. 53-54, 66). During his employment, both his remuneration and duties had steadily increased. Thus, he received five pay increases totaling nearly $100 per month, exclusive of overtime, and was charged with shop duties as a mechanic, responsibility for parts and inventory, and, through the summer of 1964, caring for trees and shrubs at a newly acquired company building (R. 15; Tr. 66, 72). He repeatedly complained to McGrath that his shop duties were not compatible with the inventory control job—"paperwork and grease do not mix"—and that he needed an assistant to maintain inventory bins and records, and to keep the mechanics from circumventing the supply system (R. 15; Tr. 77-80, 83-84, 156). McGrath agreed on several occasions that corrective measures should be taken, but no changes occurred (R. 15; Tr. 78, 79-80). In late October, Taber was told by McGrath that there was no further necessity for the groundskeeping job which Taber had been doing after working hours, adding that no further overtime would be authorized (R. 16; Tr. 81). Because of the failure to eliminate his shop duties, coupled with the fact that no helper had been assigned him and the added pressure created by the Company's

Taber replied that he had not and reminded McGrath that he had repeatedly informed him of the impossibility of keeping the records current without a helper (R. 16; Tr. 68, 147). McGrath took the inventory control cards and told Taber that henceforth they would be kept in the office (R. 16; Tr. 165).

According to Lison, McGrath showed him the cards at about 1:30 that afternoon (R. 16; Tr. 217). McGrath said that upon realizing that Taber had not maintained the inventory control cards, he "was shocked" and when he told Lison, "he was very upset . . . felt that [Taber] should be dismissed" (R. 16; Tr. 147, 150).

About 2:30 that afternoon, McGrath and Lison walked into the parts department. Lison handed Taber a check and told him he was discharged (R. 16; Tr. 69). Taber, who had no prior warning, asked why, and Lison replied that the inventory control cards had not been kept properly (R. 16; Tr. 70, 150, 216). Taber pointed to McGrath and said, "didn't I ask you for an assistant to give me a hand with inventory control, or give me a hand in the parts department generally?" (R. 16; Tr. 70). McGrath admitted this, but added that Taber "had plenty of time in the last few months to catch all this back inventory control up" (R. 17; Tr. 70, 211, 218). Lison then told Taber to "pack your personal belongings and

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acquisition of three new dealerships and the withdrawal of authorization for overtime, Taber fell behind in his inventory control (R. 16; Tr. 82). He warned McGrath of the situation and was told to "let [it] go and catch up when you can" (R. 16; Tr. 82, 148).

get out, and never come back on the premises again" (R. 17; Tr. 70, 211, 218).

II. The Board's Conclusions and Order

The Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Reed and Taber because of their activity on behalf of the Union.[7]

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights protected under Section 7 of the Act. Affirmatively, the Board's order directs the Company to reinstate Curtis Reed and Stewart Taber to their former or equivalent positions and make them whole for any loss of wages they may have suffered because of Company discrimination against them, and to post the usual notices (R. 19-21, 33).

ARGUMENT

The Company Violated Section 8(a)(3) and (1) of the Act by Discharging Taber and Reed Because of Their Union Activity

As the Trial Examiner concluded, "this case presents the comparatively rare situation where the reci-

[7] The Board did not agree with its Trial Examiner's conclusion that the Company's elimination of Taber's overtime work at premium pay on and after October 30 violated the Act. Accordingly, that portion of the complaint was dismissed (R. 31-32).

tation of the facts leading up to the discharges vividly reveals their discriminatory character" (R. 17). Thus Reed and Taber, the most senior in point of service of the Company's employees, received regular raises and were highly regarded by management until they became the spearhead of the Union's campaign to organize their fellows. Derelictions of duty, long countenanced by the Company—in fact not previously regarded as serious enough even to merit mention [8]—suddenly became grounds for immediate discharge, without warning and, in Taber's case, in angry words.

Thus, Lison's last statement to Taber, "get out, and never come back on the premises again" (Tr. 70) is both angry and unexplained. Taber's dereliction, for which he was ostensibly discharged, was failure to keep current the inventory control cards. However,

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[8] Lison testified that, to his knowledge, Taber had *never* been reprimanded for anything until the day of his discharge (Tr. 216). Reed, regarded by Lison as his "only qualified mechanic" had not been warned concerning any of the multitude of transgressions serially described by Sheldrick as reasons for discharge. Thus, Sheldrick stated that:

(1) he had received complaint from some 30 or 35 customers about Reed's poor workmanship and/or the fact that on some occasions Reed would go to a customer's establishment and merely, "stand around and stay there ten minutes, possibly, and leave"; that of the said 30 or 35 customers who complained about Reed, he could recall only (a) early in 1964, Prudential Insurance Company requested that Reed not be dispatched to its establishment because Reed "didn't do any work," (b) Simi Drive-In complained, early in the summer of 1964, that Reed came to its place of business, had the regular monthly service slip signed and then left without doing any work, (c) the firm of Tarter, Webster & Johnson complained,

it is admitted that he repeatedly informed McGrath of the fact that he could not keep, and had not kept, the cards up to date (Tr. 70, 77-80, 83-84, 211, 218, 156, 148). Certainly it could not come as a surprise to McGrath that the cards were in the condition which allegedly "shocked" him, and ostensibly angered Lison. Moreover, McGrath's "shock" is no less incredible than Lison's anger, for the inventory system itself was so unimportant to Lison that after Taber's discharge none was kept for over two months (Tr. 103). In view of these facts the Board was amply warranted in concluding that Taber's "unsatisfactory work became unsurmountable in [Lison's] eyes when Lee mentioned to McGrath [that morning] that the employees were thinking about striking the plant" (R. 18). Accordingly, Lison's angry dismissal of Taber is revealed as being directly attributable to Taber's known identification with the Union and its plans. As the Court of Appeals for the Fifth Circuit stated in similar circumstances (*Gullett Gin Co.* v. *N.L.R.B.*, 179 F. 2d 499, 501-502, modified with respect to remedy, 340 U.S. 361):

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during early summer of 1964, that Reed did not do any work when he came to its establishment, and (d) Safeco complained that Reed stopped at its place of business, slept for two hours and then left; and (2) that during the summer of 1964, he found Reed asleep on two separate occasions in the plant during working hours. (R. 13; Tr. 176, 180, 187, 191).

Nevertheless. Reed in fact had been treated with no small degree of indulgence. For instance, upon being discovered asleep on the job on two occasions, his supervisor merely admonished him to "punch out and go home * * * if he wanted to sleep" (Tr. 181). Sheldrick, the supervisor, did not report either sleeping incident to McGrath or Lison (*ibid.*).

> While a discharge in caprice or anger is not in and of itself a violation of the Act, if that caprice or anger arises out of, or may be reasonably attributed to, resentment against employees for pressing their rights under the Act, the Act specifically makes such discharges unfair labor practices.

Accord: *N.L.R.B.* v. *Moss Planing Mill Co.*, 206 F. 2d 557, 559 (C.A. 4); *N.L.R.B.* v. *Jackson Tile Mfg. Co.*, 282 F. 2d 90, 95 (C.A. 5).

Similarly, in Reed's case, it is not only a reasonable, but a nearly inescapable, conclusion that the Company's management was bent upon correcting, *nunc pro tunc*, the circumstances which underlay Lison's lament: "If Curt Reed and Stewart Taber hadn't been around, why, there wouldn't be any union . . ." (Tr. 13). Nor is such strategy without redeeming value since, in a unit composed of six employees, the loss of the most militant one-third would certainly interfere with plans for concerted employee action in connection with bargaining. Other reasons cited by the employer were properly rejected as pretextuous.

Thus, Sheldrick testified that he noticed in November that "work was falling off . . . as it normally does at that time of year" (Tr. 175). There is no evidence that this yearly slump has ever required discharges—or even layoffs—in previous years.[9] Nonetheless, according to Sheldrick he went to Lison and recommended that the employee second in seniority, the "only qualified" mechanic in the Company's em-

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[9] In November 1964, one truck driver was laid off (R. 14, n. 11; Tr. 131, 174) A replacement was hired in July 1965 (Tr. 138).

ploy, be discharged because of ancient derelictions many of which, at the time of their occurrence, had not been regarded as serious enough to warrant mention.[10]

In short, the reasons advanced by Company officials for Reed's discharge are numerous, shifting and, in large part, unsupported. Initially the Company's position was that Reed was discharged for excessive absenteeism (Tr. 31). A short while later, Reed was told that his "inability to . . . do the work" caused his discharge (Tr. 31-32).[11] Less than a week later, in answer to questioning by a union official, McGrath said that Reed had been discharged for shaving on company time (Tr. 14).[12] Still later, at the hearing,

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[10] Sheldrick stated that he "reprimanded" Reed in connection with the Prudential complaint but did not mention it to either McGrath or Lison, and did not remember whether or not he had dispatched Reed to the complaining company thereafter; that he could not recall mentioning the Simi complaint to Reed; that he "believed" he had talked to Reed about the Safeco complaint, but Reed had denied it; and that he could not recall even talking to Reed about the Tarter, Webster & Johnson complaint (*supra*, p. 8, n. 8; Tr. 188-189, 192, 193, 196). He also testified with regard to finding Reed asleep on two occasions (*supra*, p. 8, n. 8); that he did not mention even the possibility of discharge the first time he spoke to Reed and did not remember speaking to him at all on the second occasion (Tr. 194).

[11] Ten days earlier Lison had spoken of Reed as his "only qualified mechanic" (Tr. 15).

[12] Credited testimony reveals that Reed had consistently shaved during working hours, and had been observed without comment by both McGrath and Sheldrick (Tr. 35). Shortly after the election Lison told Reed and Taber (who also shaved

the Company took the position that Reed's discharge had been the result of economic necessity coupled with numerous customer complaints (*supra*, p. 8, n.8). Even assuming, *arguendo*, that each of the multiple malfeasances ascribed to Reed are factually true, "the existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 449 (C.A. 9), quoting *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 459-460 (C.A. 9). It is unremarkable that the Board's Examiner, faced with these multiple and shifting reasons advanced by management spokesmen for the discharge of Reed, found them to be "persuasive indications that antiunion reasons, rather than the reasons advanced by [company officials], accounted for the action taken against him" (R. 17).[13]

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on the job) that they were to discontinue this practice on pain of discharge (Tr. 34). Reed never again shaved on working time (*ibid.*).

[13] In thus resolving questions of credibility and concluding that the reasons given by the Company for Reed's discharge were pretexts only, the Trial Examiner, at one point, employed language in a formulation similar—but not identical—to that which he has previously used in other cases. Citing this similarity, the Company terms the formulation "boilerplate" and suggests either bias and prejudice, or lack of diligence—it is unclear which is relied upon (Co. br. p. 19). Initially, it is axiomatic that in cases such as this, in which abundant evidence, none of it inherently incredible, supports the Board's findings, it remains for the Examiner and the Board, and not the Court, to resolve questions of credibility. *N.L.R.B.* v. *Local 776, I.A.T.S.E.*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F. 2d 466, 469 (C.A. 9), and cases cited n. 10 thereat. Specifically, here, as in *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, *supra*, at p. 470, the Examiner found the stated

CONCLUSION

For the reasons stated, it is respectfully requested that the petition for review be dismissed and that the Board's order be enforced in full.

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motives to be false, inferred from the surrounding circumstances that there was another motive which the employer desired to conceal and that it was an unlawful one. In thus concluding, he found it necessary to resolve questions concerning the credibility of conflicting testimony given by the various parties. That the Examiner found certain significant characteristics in the witnesses' demeanor and modes of expression which he had observed in other witnesses in other cases, and which he described in similar language, is scarcely surprising and clearly inadequate as a basis for reversal of his findings. We submit that the Company's challenge to the trier of facts' necessary resolution of questions of credibility rests primarily upon "nothing more" than "the feeling * * * not uncommon for one against whom decision has gone" that the trier, "be he baseball umpire, trial judge or hearing officer, is biased." *N.L.R.B.* v. *Lewisburg Chair & Furniture Co.*, 230 F. 2d 155, 156 (C.A. 3).

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or

transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of re-

lief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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